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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
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**U.S. Citizenship
and Immigration
Services**



PUBLIC COPY



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FILE: [REDACTED] Office: MEXICO CITY, MEXICO Date: **MAR 17 2011**

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B)(v),
8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Mexico City, Mexico. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present for more than one year and seeking readmission within 10 years of his last departure. The applicant's spouse and two children are U.S. citizens. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his family.

The acting district director found that the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Decision of the Acting District Director*, at 4-5, dated September 26, 2008.

On appeal, counsel asserts that the applicant's spouse will suffer extreme hardship if the appeal is not granted. *Brief in Support of Appeal*, at 2, dated October 23, 2008

The record includes, but is not limited to, two briefs from counsel; statements from the applicant's spouse, the applicant's older child's teacher and nurse practitioner, the applicant's spouse's employer, the applicant's spouse's mortgage company and a truck loan company; medical documentation for the applicant's spouse; financial documents; and photographs.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general.-Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(iii) Exceptions.-

(I) Minors.-No period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States under clause (i).

....

- (v) Waiver.-The Attorney General [now the Secretary of Homeland Security, "Secretary"] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The applicant entered the United States without inspection in May 1995 and departed the United States on September 3, 1997. The applicant accrued unlawful presence from April 13, 1997, the date he turned 18 years old, until September 3, 2007, the date he departed the United States. The applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year and seeking readmission within ten years of his September 3, 2007 departure from the United States.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

{W}e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact

that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding

hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) (“Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation.”). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent’s spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing “physical proximity to her family” in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 (“[I]t is generally preferable for children to be brought up by their parents.”). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

The AAO will first address hardship to the applicant’s spouse if she relocates to Mexico. Counsel states that if the applicant’s spouse accompanied the applicant to Mexico, there will be no one to earn money and pay their home mortgage, their home could go into default, and their credit could be damaged; and neither the applicant nor his spouse is guaranteed a job in Mexico. *Counsel’s I-601 Brief*, at 3, dated August 30, 2007. The record includes documentation reflecting that the applicant and his spouse have numerous debts in the United States and issues related to making their mortgage

payments. The AAO notes that the record does not include evidence that the applicant and his spouse could not obtain employment in Mexico. However, the record includes photographs of the applicant's current residence which supports that he is not making a substantial income. As such, the claim of damage to the applicant's spouse's credit appears plausible.

The record includes medical records reflecting that the applicant's spouse has high cholesterol and a breathing condition. Furthermore, the record reflects that the applicant and his spouse have two young children. Counsel states that the applicant's spouse will suffer as her children will not be able to receive the best education and health care; the applicant's older child suffers from moderate asthma and receives inhalation therapy; he will not be able to see his current doctor and medical staff if he moves to Mexico; and the applicant's spouse worries about the health of her son. *Supra*. The record reflects that the applicant's older child has been diagnosed with moderate asthma, and he has been prescribed inhalation therapy with the use of xopenex and pulmicort. *Letter from [REDACTED] C.P.N.P.*, dated August 23, 2007.

Counsel states that the applicant's spouse has lived her entire life in the United States and she is not familiar with Mexico. *Counsel's I-601 Brief*, at 3. The applicant's spouse makes claims similar to counsel's aforementioned claims. *Applicant's Spouse's First Statement*, at 2, dated August 30, 2007. Considering the applicant's spouse's financial issues, the applicant's spouse's medical issues, the applicant's older son's medical issue, the applicant's spouse's lack of ties to Mexico, and her raising two young children in Mexico, the AAO finds that she would experience extreme hardship if she relocated to Mexico.

The AAO will now address hardship to the applicant's spouse if she remains in the United States. The applicant's spouse states that the applicant is the breadwinner in the family; she is struggling to make the house and family expense payments; she is forced to make late house payments and she is very behind on the property taxes; the mortgage company stated that it may foreclose on the home; she was unemployed before the applicant left and it has taken her three months to secure a job which pays her ten dollars per hour; she does not earn enough to pay for everything; she has borrowed money from family members to make the mortgage payments; she is caught up on the mortgage payments because she has not paid her other bills; she owes \$2,109.27 in city back taxes and the city of Houston has a lien on her house due to unpaid taxes; she is four months behind on her truck payment and it is likely she may lose her only means of transportation; and she is delinquent on almost every other bill that her family has. *Applicant's Spouse's Second Statement*, at 1-2, dated October 23, 2008. The applicant's spouse's employer states that she has taken her focus off of work and placed it on her personal problems; she has been in a depressed state and this is affecting her work; and she is taking a lot of time off of work. *Applicant's Spouse's Employer Letter*, dated October 20, 2008. The record includes a letter from a property management company reflecting that the applicant and his spouse are behind on their mortgage payments and property taxes and their property may fall into foreclosure if they do not honor the contract. *Letter from [REDACTED]*, dated July 12, 2008. The record includes a letter from a car company reflecting that the applicant and his spouse are two months behind on their car payment and the car may be repossessed for failure to pay. *Letter from [REDACTED]*, undated. The record includes numerous bills which are past due. The record includes a letter which reflects that the applicant was

employed at a golf course maintenance company and his continued prospects for employment are excellent. *Letter from [REDACTED]*, dated August 13, 2007.

The applicant's spouse states that she has developed depression since the applicant's departure, she is taking medication to treat her depression and her doctor is considering raising her dosage; her depression has caused her to gain weight, and her weight gain has been 30 pounds since the applicant's departure; and she has developed high cholesterol and a breathing problem similar to asthma. *Applicant's Spouse's Second Statement*, at 2. The record includes various medical and prescription records reflecting that the applicant's spouse has depression, high cholesterol, weight gain and a breathing condition.

The applicant's spouse details the role that the applicant plays in helping raise their two children and states that she would have a difficult time raising their children without the applicant. *Applicant's Spouse's First Statement*, at 2. The applicant's spouse states that her older son is suffering without the applicant; and his academic and behavioral performance are not up to par with the other children and his teacher says this is due to the applicant not being at home. *Applicant's Spouse's Second Statement*, at 2. The applicant's older child's teacher states that the applicant's older child suffers from a lack of enthusiasm, cries often and requires her complete attention at times; and his academic performance is suffering. *Letter from Applicant's Older Child's Teacher*, dated October 3, 2008.

Considering the applicant's spouse's financial and medical issues, her older son's educational and health issues and her raising her children alone, the AAO finds that she would experience extreme hardship if she remained in the United States without the applicant.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then “balance the adverse factors evidencing an alien’s undesirability as a permanent resident with the social and humane considerations presented on the alien’s behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country.” *Id.* at 300 (citations omitted).

The adverse factors in the present case are the applicant’s unauthorized period of stay and unauthorized employment.

The favorable factors include the presence of the applicant’s U.S. citizen spouse and children, the extreme hardship to his spouse if his waiver request is denied and his lack of any criminal convictions.

The AAO finds that the immigration violations committed by the applicant cannot be condoned. Nevertheless, the AAO finds that taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.